Supreme Court, U.S.
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No. 85-____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

RAJINDAR S. SANDHU

Petitioner.

vs.

AAMCO TRANSMISSIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether summary judgment is appropriate on the issue of discriminatory motivation in a disparate treatment case when a prima facie case has been established and evidence of pretext was presented.

PARTIES TO THE PROCEEDING

The sole parties to the proceeding are set forth in the caption.

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No. 85-____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Rajindar S. Sandhu, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the United States District Court for the Southern District of Ohio granting respondent's motion for summary judgment.

OPINIONS BELOW

The Sixth Circuit's per curiam opinion, No. 84-3802 (6th Cir. December 16, 1985) and the District Court's Memorandum and Order are set forth in Appendix A-1–A-14.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1985. This petition was filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

The federal statute involved in this case is 42 U.S.C. Section 1981.

STATEMENT OF THE CASE

The petitioner is a citizen of the United States, fifty-six years old, and holds several educational degrees including a Bachelor of Arts and two masters' degrees. He is a native of India and wears a turban, which signifies his racial and religious sect. The business dealings between the parties developed when the petitioner became a partner with another Indian franchisee on one of the respondent's franchises in Columbus, Ohio. The petitioner had attended a training program at the respondent's headquarters prior to his partnership, and while there, learned, through AAMCO officials, that another franchise site was available in the northeastern zone of Columbus. The petitioner applied on May 19, 1978 for the zone, paid his franchise fees, obtained a qualified site, and later was told that Mr. Schwartz, a caucasian, had also applied for the same zone.

On June 9, 1978, Mr. Paul Foley, Manager of Real Estate and Market Development for the respondent, telephoned the petitioner and told him that Mr. Schwartz's application had been rejected because of improper zoning, and inquired whether the petitioner was still interested in the northeast zone. The petitioner said "yes", and Mr. Foley told the petitioner that he would begin processing his application and contact him in a few days. At this point in time, based on the conversation, the petitioner was the only applicant for the northeast zone.

The petitioner waited a few days for Mr. Foley's telephone call, then called his office. Mr. Foley was out of the office, and the petitioner

asked to speak to Mr. Max Cades, the Manager of Franchise Administration. Mr. Cades returned the petitioner's telephone call on June 16, 1978; the petitioner informed Mr. Cades of Mr. Foley's telephone call and the conversation. Mr. Cades said that Mr. Schwartz had been approved. The petitioner questioned whether this decision was final since he had received the telephone call from Mr. Foley on June 9. Mr. Cades assured him that the decision was final, and as a result of Mr. Cades' statement, upon which the petitioner relied, the petitioner requested that his franchise fees be returned.

The evidence in the record reflects that Mr. Schwartz's application had been rejected on June 9, 1978 for the reason that " . . . the proposed site was not a primarily commercial or automative-oriented site". (Defendant's Answers to Interrogatories, Nos. 4–6). The respondent also stated in interrogatories that Mr. Schwartz's site application was approved on June 20, 1978.

In October 1978, however, the respondent again rejected Schwartz's zone becaue the site was not zoned properly for automotive repair, the primary business of the respondent. Another caucasian was approved for the northeast zone.

The appellate court affirmed the trial court's summary judgment decision; both courts ignore the fact that the petitioner established a prima facie case under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) involving the issue of the northeast zone. This is the only issue raised in this petition.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THE NINTH CIRCUIT DECISION ON THE SAME ISSUE.

42 U.S.C. Section 1981, guarantees "all persons . . . the same right . . . to make and enforce contracts" and prohibits racial discrimination. As the appellate court said below, "(T)he petitioner's burden of

proof as to intentional discrimination under Section 1981 is ameliorated by the application of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) pardigm to actions of Section 1981. A plaintiff establishes a prima facie case of intentional discrimination by establishing that he is a member of a minority group, that he was qualified and applied for the job, that he was not hired, and that a nonminority member was hired. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)."

The court of appeals, like the district court, assumed that the petitioner established a prima facie case of discrimination under *Burdine* and *McDonnell Douglas*. The petitioner did establish a prima facie case of discrimination. The Court of Appeals stated in its opinion that "even assuming [petitioner] established a prima facie case, . . . in light of [petitioner's] failure to establish that this policy was pretextual, the granting of summary judgment was appropriate." Appendix, p. A-5. The petitioner presented the undisputed facts by way of respondent's answers to interrogatories establishing that the respondent informed the petitioner on June 9, 1978 that Schwartz's application had been rejected because his site was not properly zoned. Within one week, the respondent changed its position on the Schwartz's site approval, and no where in the record is there any evidence as to why the shift in position. This case involves the motivation of the respondent and is plainly reserved for the trier of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

The petitioner maintains that after establishing his prima facie case of discrimination, and where the motivation of the respondent is at issue, the trier of fact court cannot grant a motion for summary judgment. The Court of Appeals for the Ninth Circuit has held that when a prima facie case is established, ". . . summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits. *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (CA 9 1985). See also *Bell v. Crackin Good Bakers, Inc.*, 777 F2d 1497 (CA 11 1985). In *Lowe*, the Ninth Circuit stated,

"Very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive". 775 F2d at p. 1009. In order to do so, the plaintiff need not necessarily offer evidence beyond that offered

to establish a prima facie case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 255, n. 10.

The Sixth Circuit's standard requiring the petitioner to prove the respondent's motivation on a motion for summary judgment conflicts with the Ninth Circuit's decision in *Lowe*. Proof of a prima facie case was sufficient to overcome the respondent's motion for summary judgment.

CONCLUSION

Because of the conflict between the circuits, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Ruzicho, a member of the Bar of this Court and counsel for Petitioner herein, hereby certifies that on this 15th day of March 1986, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served, postage prepaid, upon Suzanne Richards, Esq. Vorys, Sater, Seymour & Pease, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216.

ANDREW J. RUZICHO

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APPENDIX

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NOT FOR PUBLICATION

No. 84-3802

IN THE UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAJINDAR S. SANDHU,

Plaintiff-Appellant,

v.

AAMCO TRANSMISSIONS, INC.,

Defendant-Appellee.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

BEFORE: LIVELY, Chief Judge, WELLFORD, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

Per Curiam. Plaintiff-appellant Rajindar Sandhu appeals from the district court's granting of summary judgment in favor of defendant-appellee AAMCO Transmission, Inc. (AAMCO) in this private discrimination action under 42 U.S.C. § 1981 (1982). On appeal, Sandhu alleges that the district court erroneously concluded that no issues of material fact existed as to his claim. After carefully reviewing the record, we affirm.

This case arises out a series of business dealings between Sandhu, who is a native of India and a United States citizen, and AAMCO.

The dealings between the parties originated out of a partnership agreement, entered into in November of 1977, between Sandhu and Vijay Nayyar, pertaining to an AAMCO transmission center which Nayyar had recently purchased. In late February or early March of 1978, Nayyar contacted AAMCO, requested that Sandhu be added to the partnership agreement between Nayyar and AAMCO, and asked if Sandhu could attend AAMCO's training course. AAMCO agreed and after Sandhu completed the training course in April of 1978, he was added to the partnership agreement.

Sandhu, shortly thereafter, submitted a second, independent franchise application to AAMCO with an attendant site application for the northeastern zone of Columbus. At this time, another individual, Schwartz, already had an application pending for the same site zone. Due to AAMCO's first-come, first-serve policy, Schwartz's application was considered before Sandhu's. Sandhu, for reasons which are disputed, withdrew his application in June of 1978. After Sandhu had withdrawn his application, Schwartz was unable to obtain a necessary zoning variance, which caused his application to lapse. The next applicant, Vogt, was subsequently considered and approved for the zone.

There were no other significant contacts between AAMCO and Sandhu until April 1979 when the franchise in which Sandhu and Nayyar were partners was inspected by AAMCO. The inspection disclosed seven violations of AAMCO required procedures and four violations of a Federal Trade Commission consent decree with AAMCO. Because of these violations, an AAMCO representative, Jerry Ross, requested that Sandhu and Nayyar sell their franchise back to AAMCO. Sandhu and Nayyar refused, contending that they had remedied the violations. AAMCO later dropped the matter.

On September 3, 1981, Nayyar and Sandhu jointly sought an additional franchise in Newark, Ohio. AAMCO responded to the request in a letter dated March 31, 1982 which stated that their application would be held in abeyance for ninety days to allow various deficiencies in their existing franchise to be corrected. Before Nayyar and Sandhu had received this letter, they submitted another application on March 25, 1982 for a franchise in Dublin, Ohio. AAMCO responded to this request in

a letter dated April 12, 1982 which referenced to the March 31 letter and stated that the application would be held in abeyance for ninety days. Sometime in July, 1982, Sandhu sold his partnership interest to Nayyar and Nayyar then informed AAMCO that he did not desire to pursue the applications for franchises in Dublin or Newark. Sandhu then commenced the present action under 42 U.S.C. § 1981 (1982) against AAMCO, alleging that AAMCO discriminated against him on the basis of his Indian heritage by favoring Caucasian applicants over him, by harassing him with unwarranted inspections, and by trying to force Nayyar and him to sell their franchise.

Section 1981, 42 U.S.C. § 1981 (1982), guarantees "all persons . . . the same right . . . to make and enforce contracts." Although Section 1981 prohibits all racial discrimination whether or not the defendant acts under the color of state law, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968), the plaintiff, in order to establish a cognizable claim, must prove that the defendant purposefully discriminated against him, *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 387-91 (1982). The plaintiff's burden of proof as to intentional discrimination is ameliorated by the application of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) paradigm to actions under Section 1981. *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140, 141 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). Thus, in general terms, a plaintiff establishes a prima facie case of intentional discrimination by establishing that he is a member of a minority group, that he was qualified and applied for the job, that he was not hired, and that a nonminority member was hired. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Furthermore, since this case was decided on a motion for summary judgment, *see* Fed. R. Civ. P. 56(c), we can only affirm the district court's decision if viewing the evidence in a light most favorable to Sandhu no issue of material fact exists as to Sandhu's discrimination claim. *See SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985) (per curiam). With this standard in mind, we turn to Sandhu's assignments of error.

Sandhu's first assignment of error is that the district court erroneously determined that no issue of material fact existed pertaining to his claim that AAMCO discriminated against him in considering Schwartz's

application before his and in AAMCO's giving the franchise in the northeastern zone of Columbus to Vogt. Sandhu does not dispute that Schwartz's application was received by AAMCO first, that AAMCO's legitimate, nondiscriminatory policy was to consider applications on a first-come, first-serve basis, that he voluntarily withdrew his application before Schwartz's applicaton lapsed, and that Vogt's application was the next in line after Schwartz's application lapsed. These undisputed facts mandate that we affirm the district court on this issue. Concerning AAMCO's considering of Schwartz's application before Sandhu's, even assuming Sandhu established a prima facie case, AAMCO considered Schwartz's application first pursuant to its undisputed legitimate, nondiscriminatory policy of considering applications on a first-come, first-serve basis. Thus, in light of Sandhu's failure to establish that this policy was pretextual, the granting of summary judgment was appropriate. *See Burdine*, 450 U.S. at 253. Further, as to AAMCO's granting Vogt a franchise in the northeastern zone of Columbus, Sandhu has admitted that he voluntarily withdrew his application before Schwartz's application lapsed. Consequently, Sandhu did not even have an application pending when AAMCO considered Vogt's. As a matter of law, therefore, Sandhu has failed to establish a prima facie case of discrimination. Accordingly, we reject Sandhu's first assignment of error.

Sandhu next contends that AAMCO conducted a harrassing and discriminatory inspection of his and Nayyar's franchise. This claim fails for two reasons. First, Sandhu has not controverted the fact that all Columbus AAMCO franchises, including his own, were inspected at approximately the same time. Second, Sandhu explicitly acknowledged that he did not know if his franchise was being treated unlike any other AAMCO franchise. From the foregoing, the only conclusion which can be drawn from the evidence is that AAMCO did not treat the Sandhu-Nayyar franchise any different from the other Columbus franchises. Therefore, the district court properly granted summary judgment in AAMCO's favor on this issue.

Even assuming that the inspection was legitimate, Sandhu maintains that he and Nayyar were asked to sell their franchise back to AAMCO while similary situated Caucasian franchisors were not. Initially, Sandhu does not dispute that, at the time of the inspection, his franchise was

in violation of both AAMCO's required procedures and a Federal Trade Commission consent decree. AAMCO's Vice President, Shnycer, in his affidavit stated that he had requested his special assistant, Ross, to ask other franchisors with similar violations to sell their franchises back to AAMCO. To controvert Shnycer's affidavit, Sandhu introduced his own affidavit which averred "upon belief" that other franchisors with similar violations were not asked to sell their franchises. Sandhu's mere allegation "upon belief" simply does not suffice to create an issue of material fact. *See Smith v. Hudson*, 600 F.2d 60, 64-65 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979). Accordingly, the district court properly determined that Sandhu failed to create an issue of material fact on this issue.

Sandhu's final contention is that a material issue of fact exists pertaining to whether AAMCO discriminated against him by holding his and Nayyar's joint applications for franchises in Dublin and Newark, Ohio in abeyance pending their curing of deficiencies in their Columbus franchise. Sandhu does not dispute that the existing franchise was, among other things, in arrears in paying its franchise fees; rather, Sandhu alleges that Vogt was given an additional franchise despite similar deficiencies in his then existing franchise. Again, Sandhu's only support for this theory is his own allegation that Vogt's existing franchise had similar deficiencies. In contrast, AAMCO introduced the affidavit of its contract administrator, Max Cades, in which Cades averred that Vogt's existing franchise did not have any deficiencies when Vogt was granted another franchise. Further, AAMCO introduced its pre-review board form which indicated that Vogt had met all the requirements for an additional franchise. Sandhu's mere allegation alone does not suffice to controvert the evidence which AAMCO introduced on this issue. *See Smith*, 600 F.2d at 64-65. Thus, the district court properly concluded that no issue of material fact existed as to this question.

Based upon the foregoing, the judgment of the district court is affirmed.

ISSUED AS MANDATE: January 8, 1986
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rajindar S. Sandhu,

Plaintiff

vs. Case No. C-2-82-719

AAMCO Transmissions, Inc.,

Defendant

MEMORANDUM AND ORDER

Plaintiff commenced this action to redress alleged violations of his civil rights as secured by the Thirteenth and Fourteenth Amendments to the Constitution and 42 U.S.C. §1981. Specifically plaintiff alleges that his constitutional rights were violated (1) by defendant's failure to grant plaintiff the Northeast zone of the Columbus, Ohio Standard Metropolitan Statistical Area (SMSA) for establishment of his franchise; (2) by defendant AAMCO's inspections of plaintiff's franchise operation of North High Street and further by defendant's request that plaintiff sell that franchise back to defendant; and finally (3) by defendant's failure to grant plaintiff an additional franchise in Newark, Ohio.

The defendant has now moved the Court for summary judgment, which motion plaintiff opposes. Having carefully reviewed all matters of record, the Court concludes that there are no material issues of disputed fact and that defendant is entitled to judgment as a matter of law.

I

The facts giving rise to this suit may be summarized as follows.

Defendant AAMCO is in the business of franchising traminssion repair centers across the United States. In exchange for certain consideration, AAMCO permits the use of its trademark. AAMCO protects its trademark by requiring applicants to meet certain established prerequisites including a requirement that prospective franchisees undergo special training. AAMCO further monitors its franchisees to insure compliance with the franchise agreement and various AAMCO policies and procedures. Further, AAMCO retains the right to terminate any franchise which violates the agreement or AAMCO policies and procedures.

In the fall of 1977, Vijay Nayyar purchased an AAMCO transmission center and submitted a franchise application to AAMCO. (Df. Ex. B and C.) On November 30, 1977, Nayyar's AAMCO franchise was approved subject to his completion of the AAMCO training course.

On November 25, 1977, Nayyar entered into a partnership agreement with plaintiff Rajindar Sandhu. Nayyar and Sandhu are both natives of India. Plaintiff Sandhu is presently a United States citizen; Nayyar is a resident alien.

In late February-early March of 1978, Nayyar contacted the defendant and requested that Sandhu be added to the franchise agreement between Nayyar and AAMCO. Nayyar also requested that plaintiff be allowed to attend the AAMCO training course.

On March 8, 1978, Mr. Max Cades of AAMCO responded to Nayyar's request by mailing an amended franchise agreement which added Sandhu as a co-franchisee. A franchise application for Sandhu's use was also mailed. (Df. Ex. D.)

During May and April of 1978, Sandhu attended the AAMCO training course and thereafter plaintiff's franchise application was approved by an AAMCO Board of Review. (Ef. Ex. E and F.) Following the approval of plaintiff as a co-franchisee, plaintiff submitted a second franchise application independent of any application submitted in conjunction with Nayyar's franchise. On May 18, 1978, Sandhu appeared before a second Board of Review concerning his second franchise application. That application was similarly approved on May 30, 1978. (Ef. Ex.

G and H.) At or about the same time of this second franchise application, plaintiff also submitted a site application requesting that he be granted the right to operate an AAMCO franchise in the Northeast zone of the Columbus SMSA. This zone application is the subject of plaintiff's first allegation of discrimination.

It is undisputed that at the time plaintiff submitted his application for the Northeast zone, another applicant, Mr. Schwartz, had already submitted a site application for that zone. (Df. Ex. K.) Plaintiff was informed at the time of his site application that Mr. Schwartz had a pending application for that same site and that as a matter of policy defendant generally approved site applications on a first-come, first-served basis. (See Cades Affidavit, ¶16.) Plaintiff does not dispute the foregoing.

There is, however, some dispute as to whether or in what language plaintiff was informed about the difficulty that Schwartz was having obtaining a zoning variance for the site he selected. The court does not consider this to be a material issue of disputed fact.

First, it is undeniable that defendant AAMCO could conditionally grant Schwartz's site application for the Northeast zone pending resolution of the zoning problem. Second, plaintiff himself would have been required to obtain a zoning variance for the site he selected in his application for a Northeast franchise. Finally, plaintiff admits that he was informed of both the first-come, first-served policy and of the possibility of conditional approval of Schwartz's site application. In sum, even if the Court assumes that Schwartz could not obtain a zoning variance and further assumes that plaintiff was informed of Schwartz's problems with zoning, it is undisputed that Schwartz's site application predated plaintiff's and was therefore entitled to consideration before plaintiff's site application.

The undisputed facts further demonstrate that before any final decision could be made concerning Schwartz's application for the Northeast zone, Sandhu voluntarily terminated his franchise agreement with AAMCO.

More specifically, plaintiff, in June of 1978, wrote to Mr. Cades informing him that he no longer wanted a franchise for the Northeast zone

but instead wanted once again to be added as a partner to Nayyar's franchise agreement. (See Df. Ex. O and P; Sandhu Deposition at 45-46.)

Despite the foregoing, plaintiff claims that he should have been given a franchise in the Northeast zone in October of 1978 when Mr. Schwartz withdrew his application for that zone and terminated his franchise agreement with defendant. (Df. Ex. W and X.) While the Court does not question plaintiff Sandhu's heartfelt desire to open a franchise in the Northeast zone, the Court also finds that the undisputed evidence establishes that plaintiff had withdrawn his application for that site in June 1978. Therefore, at the time Schwartz withdrew his application in October 1978, plaintiff had no application pending with the defendant for the Northeast zone.

Shortly after Schwartz withdrew his site application, defendant AAMCO received a site application for the Northeast zone from Mr. Vogt. (Df. Ex. Y.) Plaintiff does not dispute that following Schwartz's withdrawal of his application, Vogt was the first franchisee to indicate an interest in the Northeast zone and that defendant AAMCO, following its usual first-come, first-served policy granted Vogt that zone. (Sandhu Affidavit at 4.)

In the meantime, Sandhu was again attempting to be added as a co-franchisee to the agreement between Nayyar and AAMCO. (Df. Ex. O and P.) Once again, defendant AAMCO indicated that it had no objection to allowing plaintiff to be added as co-franchisee (Df. Ex. O, P, Q and R.) However, Nayyar was no longer agreeable to this arrangement and requested that Sandhu not be added to the agreement between Nayyar and AAMCO. (See Df. Ex. T.)

From June of 1978 until February 1979, plaintiff Sandhu therefore was neither an independent franchisee nor a co-franchisee with Nayyar. In fact, plaintiff Sandhu had no formal or contractual relationship with AAMCO at this time. In February of 1979, Nayyar authorized defendant AAMCO to add Sandhu to Nayyar's franchise. (Df. Ex. U.) Amost immediately thereafter Nayyar's franchise agreement was amended and plaintiff was added as a co-franchisee.

During the time that plaintiff had a franchise arrangement with defendant, the defendant conducted inspections of plaintiff's franchise center on North High Street. Plaintiff alleges that his rights were violated by these inspections and by the defendant's attempt to force him to sell the North High Street franchise following these alleged pretextual inspections.

AAMCO had a system of performing periodic inspections of each franchise. There were two possible types of inspections that could be conducted by defendant AAMCO, operations inspections to check for cleanliness and appearance, and comsumer affairs inspections to insure against fradulent or deceptive practices by franchisees. (Shnycer Affidavit ¶2.)

It is undisputed that operations and comsumer affairs inspections of plaintiff's North High Street franchise were conducted within a month of each other and shortly after plaintiff was added as a co-franchisee. It is also undisputed that inspections of other franchisees occurred at or about the same time and with similar frequency. In other words, there is simply no basis for the Court concluding that plaintiff was treated differently. Other than the close time proximity within which these inspections were conducted, there is no evidence whatsoever that the inspections were conducted in a manner so as to harrass plaintiff. Plaintiff concedes as much in his own deposition. (Sandhu Deposition at p. 61.)

In April 1979, following a consumer affairs inspection which disclosed a substantial number of violations of AAMCO rules and procedures, an AAMCO representative visited plaintiff and Nayyar at the North High Street location. At that time the suggestion was made that plaintiff and Nayyar might want to consider selling their franchise center back to defendant. (Df. Ex. BB and CC.) Plaintiff concedes that the sale request was made only after the franchise agreement and consumer affairs violations were discovered. Plaintiff further acknowledges that at the time AAMCO requested plaintiff to consider a sale, plaintiff understood that that request was being made because of the rules violations. (Sandhu Deposition pp. 69-74.)

It is also undisputed that similar requests have been made of other franchisees whose centers have been found to be in violation of AAMCO rules and procedures. (Shnycer Affidavit ¶14.) The undisputed facts

further establish that plaintiff was not forced to sell the franchise center in question but rather continued as a franchisee of the North High Street store. Defendant AAMCO afforded plaintiff the opportunity to rectify violations and problems at the North High Street center.

Plaintiff's final allegation of discrimination involves the alleged discriminatory denial of the right to purchase a second franchise. Specifically, in 1981 Sandhu and Nayyar became interested in purchasing an existing franchise in Newark, Ohio, in addition to the franchise which they already operated on North High Street. In September of 1981, plaintiff and Nayyar submitted applications for an additional AAMCO franchise in Newark. (Df. Ex. FF.) Rather than deny those applications, defendant AAMCO placed those applications on hold in order to give Sandhu and Nayyar the opportunity to bring their existing franchise into compliance with the terms of the franchise agreement. (Df. Ex. GG and HH.)

Thereafter plaintiff sent Mr. Cades, an AAMCO representative, a letter expressing a preference to acquire a second center in Dublin instead of Newark. (Df. Ex. II.) Consistent with its prior conduct, defendant AAMCO placed this request on hold as well and allowed plaintiff to rectify violations and problems at his existing franchise center.

Sometime in July 1982, before any final action could be taken on either the Dublin or Newark applications, plaintiff Sandhu sold his interest in the North High Street center to Nayyar. (Df. Ex. KK.) Thereafter, Nayyar expressed a desire not to pursue the prior applications for a Dublin or Newark center. Defendant AAMCO therefore took no further action on those applications.

II

As has already been noted, and based upon the foregoing, plaintiff alleges violations of his rights as secured by the Thirteenth and Fourteenth Amendments to the Constitution and 42 U.S.C. §1981. On the undisputed facts as set forth above, the Court believes that there are no disputed issues of material fact and that defendant is entitled to judgment as a matter of law.

First, with respect to plaintiff's allegations under the Fourteenth Amendment, there are absolutely no facts or allegations from which this Court could infer state involvement in any of the alleged actions of the defendant. In sum, the plaintiff's complaint and the pleadings in the file of this matter utterly fail to establish a claim under the Fourteenth Amendment.

Second, with respect to plaintiff's allegations under 42 U.S.C. §1981, it is now well established that liability cannot be imposed under that section of the Civil Rights Act which prohibits discrimination in the making and enforcing of contracts, absent proof of intentional discrimination. *General Building Contractors Ass'n., Inc. v Pennsylvania*, 458 U.S. 375 (1982). *See also Smith v. Pan Am World Airways*, 706 F.2d 771 (6th Cir. 1983).

In addition, with respect to plaintiff's claim under the Thirteenth Amendment, generally there is no direct right of action under that provision of the Constitution. To the extent that such a claim or right of action may be asserted or is available directly under that constitutional provision, the standards for evaluating such a claim would be the same as the standards for judging a claim under 42 U.S.C. §1981, the statute usually invoked when attempting to enforce Thirteenth Amendment claims.

This Court must therefore decide whether under the undisputed facts of this case plaintiff may recover for intentional discrimination in violation of 42 U.S.C. §1981. The Court concludes that plaintiff has failed to allege any facts which, if proven, would establish that plaintiff was the victim of intentional discrimination in violation of his constitutional or statutory rights.

First, with respect to plaintiff's failure to obtain a franchise for the Northeast zone, the undisputed evidence establishes that plaintiff was not the first applicant for that zone and that Mr. Schwartz, the first applicant, was granted the zone pursuant to AAMCO's nondiscriminatory first-come, first-serve policy. Likewise, after Schwartz withdrew his application for the Northeast zone, Vogt's application for that zone was approved because it was the first received. At the time Vogt's applica-

tion was approved, plaintiff had voluntarily terminated his franchise agreement with defendant AAMCO.

In sum, plaintiff's bald, unsupported allegation of discrimination cannot serve to defeat defendant's motion for summary judgment where there is no evidence in the record to support those allegations.

The Court further finds that plaintiff has failed to establish a cause of action under §1981 or otherwise on the basis of defendant's failure to grant plaintiff an additional franchise in Newark, Ohio. More specifically, it is undisputed that plaintiff's first franchise was not in compliance with AAMCO's rules and procedures. The Court therefore has no basis for concluding that defendant was incorrect in finding, assuming the defendant so concluded, plaintiff not qualified to operate a second franchise. Moreover, there is some doubt as to whether plaintiff's application for a second franchise was ever rejected. It appears that plaintiff's application was held in abeyance to allow plaintiff the opportunity to bring his first franchise into compliance with defendant's rules. Before any final decision regarding this second application could be made, that application was withdrawn.

In sum, the Court finds the complete absence of any evidence from which one could infer discriminatory animus in the denial of plaintiff's application for a second franchise. In addition, for the reasons previously set forth, the Court finds insufficient evidence of discrimination in defendant's inspections of plaintiff's North High Street franchise.

Accordingly, defendant's motion for summary judgment is well taken and is hereby GRANTED.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

Supreme Court, U.S.
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No. 85-1539

In the Supreme Court of the United States

October Term, 1985

RAJINDAR S. SANDHU,
Petitioner,

v.

AAMCO TRANSMISSIONS, INC.,
Respondent.

Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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No. 85-1539

In the Supreme Court of the United States

October Term, 1985

RAJINDAR S. SANDHU,

Petitioner,

v.

AAMCO TRANSMISSIONS, INC.,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

Petitioner is a United States citizen who was born in India. Petitioner initially applied to become, and was approved by respondent[1] to be, a co-franchisee on an existing franchise agreement between respondent and Vijay Nayyar, a resident alien in the United States who is also a native of India. Following this approval as a franchisee, petitioner decided he did not wish to be added to Mr. Nayyar's franchise agreement; instead, he requested that he be granted a new franchise of his own. Respondent

[1]Respondent AAMCO Transmissions, Inc. is a wholly-owned subsidiary of AAMCO Industries, Ltd. Master Lease Corporation and Higgins Delta Corporation are affiliates of Respondent AAMCO Transmissions, Inc.

again approved petitioner as a franchisee, this time for a new franchise in the Columbus, Ohio Standard Metropolitan Statistical Area.

Petitioner then submitted an application to respondent requesting the northeast zone of Columbus, Ohio as the site of his franchise center. At the time petitioner submitted his site application, another franchisee, Mr. Bruce Schwartz, already had an appliction pending with respondent for the same zone. As a matter of established corporate policy, respondent approves site applications submitted by its franchisees on a first-come, first-served basis and respondent does not consider and review any other application for that zone until a final decision is made on the first application. Petitioner was informed of this policy and the fact that the zone was presently unavailable because of Mr. Schwartz's application. Respondent tried to interest petitioner in applying for a different zone which was available and for which respondent was seeking applicants. Petitioner declined to consider locating his franchise outside the northeast zone.

The site application submitted by Mr. Schwartz indicated that a zoning variance would be required for the site he selected. Likewise, the site application submitted by petitioner indicated that a zoning variance would be required for the site he selected.

Respondent, as a matter of corporate policy, routinely approved site applications which required zoning variances. Petitioner was informed of this policy. Mr. Schwartz's application for a site in the northeast zone was eventually approved.

After learning of the approval of Mr. Schwartz's application for a site in the northeast zone, petitioner voluntarily terminated his franchise agreement with respondent and withdrew his application for the northeast zone. Specifically, petitioner in June, 1978, wrote to respondent and indicated that he no longer wanted a franchise for the northeast zone and requested a return of his franchise fees. Pursuant to his request, these fees were returned to petitioner by respondent.

In October, 1978, Mr. Schwartz withdrew his application for a site in the northeast zone. At that time, petitioner was not a franchisee and had no application pending for the northeast zone because of his voluntary termination in June, 1978 of his franchise agreement with respondent.

Shortly after Mr. Schwartz withdrew his application, respondent received an application for a site in the northeast zone from Mr. Vogt. The Vogt application was the first application received for a site in the northeast zone after that zone became available due to Mr. Schwartz's withdrawal of his application. Petitioner did not have an application pending at the time the Vogt application was received and petitioner was not even a franchisee at that time. Respondent followed its ususal first-come, first-served policy and reviewed and approved Mr. Vogt's application.

REASONS FOR DENYING THE WRIT

The Decision Of The Sixth Circuit Is Not In Conflict With Any Decision Of The Ninth Circuit.

There are two reasons why there is no conflict between the decision of the Court of Appeals for the Sixth Circuit in

the instant case and the decision of the Court of Appeals for the Ninth Circuit in *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985). First, the Court of Appeals for the Ninth Circuit in *Lowe* did not hold that summary judgment may never be granted in an intentional discrimination claim arising under 42 U.S.C. §1981 (1982) once a plaintiff has introduced evidence of a *prima facie* case. Second, while in *Lowe* the plaintiff offered evidence of a *prima facie* case and additional evidence raising an issue as to whether the defendant's articulated nondiscriminatory reason for not hiring the plaintiff was pretextual, the petitioner in the present case failed to present evidence to the trial court sufficient to raise an issue of discriminatory intent or motive.

Petitioner alleged in his Complaint that respondent discriminatorily refused him the opportunity to contract with the respondent in violation of 42 U.S.C. §1981 and requested money damages for this alleged violation. Section 1981 was originally designed to uproot the institution of slavery and to eradicate its badges and incidents. Section 1981 is, however, not an affirmative action program. It is an equalization provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. Thus, "[w]hen a person sues under [Section 1981] to enforce his right not to be discriminated against in private employment, he must show that he was unable to make or enforce a contract that white citizens were able to make or enforce." *Long v. Ford Motor Company*, 496 F.2d 500, 504 (6th Cir. 1974). Moreover, this Court has held that a plaintiff must show that the defendant intentionally discriminated against the plaintiff because of race before a plaintiff

may recover damages under §1981. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

Petitioner contends that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985). This contention is incorrect. In *Lowe*, the Court of Appeals for the Ninth Circuit recognized that to establish a *prima facie* case in a §1981 action, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination. Plaintiff's burden is met by offering evidence of the following criteria:

1. That the plaintiff belongs to a class protected by §1981;

2. That the plaintiff applied and was qualified for an opening for which the defendant was seeking applicants;

3. That, despite being qualified the plaintiff, was rejected; and

4. That, after the plaintiff's rejection, the position remained open and the defendant continued to seek applications from persons of comparable qualifications.

See Lowe v. City of Monrovia, 775 F.2d at 1005.

The court of appeals in *Lowe* recognized that once the plaintiff meets her burden of introducing evidence of a *prima facie* violation of §1981, it is then incumbent upon the defendant to articulate a legitimate nondiscriminatory reason for its decision. The *Lowe* decision states that on a

motion for summary judgment in a §1981 case, the defendant's articulation of a legitimate nondiscriminatory reason serves to shift the burden back to the plaintiff to raise a genuine factual issue as to whether the proffered reason is pretextual. *Id.*, at 1008. In order to fulfill that requirement, the plaintiff in *Lowe* submitted evidence showing the defendant would not hire blacks and that defendant urged plaintiff to find a job elsewhere.

While the *Lowe* court recognized the difficulty of rendering summary judgment in a §1981 case, it clearly did not hold that summary judgment could never be granted once the plaintiff introduced evidence of a *prima facie* case. At best, the *Lowe* court concluded that summary judgment should only be granted with great caution in employment discrimination cases where the plaintiff is able to offer evidence of a *prima facie* case.

An examination of both the decision of the Court of Appeals for the Sixth Circuit and the district court's opinion herein reveals that neither decision required the petitioner to prove the respondent's motivation on a motion for summary judgment as petitioner contends. Instead, the opinions recognized that petitioner failed to introduce any evidence of discrimination and that petitioner was trying to rely upon bald, unsupported allegations.

In its opinion, the Court of Appeals for the Sixth Circuit utilized the well-settled standards for establishing a *prima facie* case of intentional discrimination as enunciated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The court of appeals also indicated that it could "only affirm the district court's decision if viewing the evidence in a light most favorable to [petitioner] no issue of material fact exists as to [petitioner's] discrimination claim." App. to pt. for cert. A-4.

With the standard for a *prima facie* case in a §1981 action clearly in mind, the court of appeals reviewed the record to determine whether there was an issue of material fact to petitioner's claim that he was treated differently than non-minority applicants. It concluded in this regard:

> [Petitioner] does not dispute that Schwartz's application was received by [respondent] first, that [respondent's] legitimate, nondiscriminatory policy was to consider applications on a first-come, first-serve basis, that [petitioner] voluntarily withdrew his application before Schwartz's application lapsed, and that Vogt's application was the next in line after Schwartz's application lapsed. These undisputed facts mandate that we affirm the district court on this issue.

App. to pt. for cert. A-5.

The court of appeals recognized that the undisputed facts placed before the district court failed to establish an issue as to whether petitioner was treated differently than whites or whether respondent withheld the northeast zone from petitioner because of his race. Indeed, the undisputed facts showed no discriminatory treatment.

The record submitted to the district court established that: Mr. Schwartz's application was pending when petitioner submitted his application; respondent reviewed applications on a first-come, first-served basis; and respondent had in the past approved applications pending procurement of a zoning variance. The undisputed facts further established that petitioner voluntarily terminated his franchise agreement with respondent and withdrew his site application. Some four months after petitioner terminated his franchise agreement, Mr. Schwartz voluntarily withdrew his application for the northeast zone and Mr. Vogt

was the first individual to apply for the northeast zone after Mr. Schwartz's application was withdrawn.

From these undisputed facts it can only be concluded that the respondent was not seeking applicants for the northeast zone at the time petitioner applied for the zone, that petitioner's application was never reviewed and rejected, and that the northeast zone did not remain open and respondent did not seek additional applicants for that zone after petitioner withdrew his application. Thus, petitioner failed to offer any evidence to support the second, third and fourth requirements of a *prima facie* case under §1981. The district court properly concluded that there was *no* evidence in the record to support petitioner's allegation of discrimination and the Court of Appeals for the Sixth Circuit properly affirmed the district court's decision.

The Court of Appeals for the Sixth Circuit did go on and state that "even assuming" petitioner established a *prima facie* case, respondent had offered evidence of its legitimate, nondiscriminatory reason for approving Mr. Schwartz's application. Petitioner's mere allegations of discrimination, standing alone, were not sufficient to controvert the evidence which respondent introduced of its reason for considering Mr. Schwartz's application first. No evidence called into question respondent's legitimate, nondiscriminatory policy of awarding franchise zones to qualified applicants on a first-come, first-served basis. There was not even the slightest hint in the record before the district court of discriminatory animus on the part of the respondent. Thus, the Court of Appeals for the Sixth Circuit also correctly found that petitioner had failed to establish a fact question as to whether respondent's reasons were pretextual.

Not only is the record—developed after full and lengthy discovery—devoid of any factual support for petitioner's assertions, but petitioner also seeks to maintain an erroneous proposition of law: that summary judgment cannot be had when a claim involves discriminatory intent. In effect, petitioner is contending that a claim under §1981 falls outside the ambit of Rule 56 of the Federal Rules of Civil Procedure. Neither Rule 56 itself nor any case law, including *Lowe*, supports such a contention. Accordingly, the petition for writ of certiorari filed by petitioner should be denied.

Petitioner Lacks Standing To File A Petition For Writ Of Certiorari In This Case Since He Has Filed A Petition In Bankruptcy.

An additional ground exists for denial or, alternatively, dismissal of the petition for writ of certiorari. On October 21, 1985, the petitioner filed a petition in bankruptcy in the United States District Court for the Southern District of Ohio, Eastern Division. *In re Rajindar and Inderjit Sandhu*, Case No. 2-85-03341 (Bankr., S.D. Ohio, E.D.). Pursuant to 11 U.S.C. §541(a) (1982 & Supp. II 1984), all legal interest which petitioner had in his claim for money damages against respondent became part of the bankruptcy estate. *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911) (estate regarded as *in custodia legis* from the filing of the bankruptcy petition).

The Trustee in Bankruptcy is the representative of the estate and only the Trustee has authority to authorize the filing of additional legal proceedings in this case. *Accord, Meyer v. Fleming*, 327 U.S. 161 (1946) (title of claim rests in bankruptcy trustee). Prior to the filing of the petition for writ of certiorari in this case, neither petitioner nor his

counsel contacted the Trustee to obtain authorization to proceed in this Court. The Trustee himself has not authorized these proceedings. Accordingly, the petition for writ of certiorari filed by petitioner should be denied or, alternatively, dismissed.

CONCLUSION

Petitioner has failed to establish that a conflict exists between the standards followed by the Court of Appeals for the Sixth Circuit in this case and the standards followed by the Court of Appeals for the Ninth Circuit. No factual or legal basis exists for the positions which petitioner asserts in his petition. Additionally, petitioner no longer has authority to pursue this action since he has filed a petition in bankruptcy. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. William O'Neill, a member of the Bar of this Court and counsel for respondent herein, hereby certify that on this 15th day of April, 1986, three copies of the Brief Opposing the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served, postage prepaid, upon Andrew J. Ruzicho, 3040 Riverside Drive, Suite 102, Columbus, Ohio 43221.

C. WILLIAM O'NEILL

APPENDIX

11 U.S.C. Section 541(a) (1982 & Supp. II 1984)

§541. Property of the estate

(a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under Section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under Section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the

filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.